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THE ENGLISH JUDICATURE ACT AND THE AMERICAN CODES.

Connecticut was the only one of the American states to adopt the English judicature act. Most of the states have adopted a uniform negotiable instruments act, but there is even a greater need of uniform laws of procedure for all the states.

The importance of procedure seems not to have been fully grasped by the majority of the state legislatures. The fact that in England the matter of procedure is left to the judges shows that there it is fully understood that they are best qualified to regulate a matter which the average legislator is not educated to understand. The judges make the rules of procedure in England and Connecticut and if any questions arise about the rules or any matter of procedure the judges get together and agree as to what rules shall govern them. They are certainly better able to settle such questions satisfactorily than a legislature. The practice under that act has been pre-eminently satisfactory. The English judicature act is analogous to our American codes but is simplified greatly by leaving the questions of procedure to the judges. It is the simplest form of procedure extant. How matters would be simplified and unified all over the country, if the English act were adopted for the United States courts and by all the states. An English lawyer could without embarrassment practice in the United States, and an American lawyer could with equal facility practice in the dominions of Great Britain, and as the English code is practically drawn from the civil law he would not be disqualified because of a lack of knowledge of procedure in any place where the civil code is in use. The English judicature act was a great triumph for the Baconian idea, which seems first to have taken root in America and then improved upon in England, thus verifying the prediction of Bacon, that though Coke's idea had triumphed at the time, future generations would judge him (Bacon) to be the greater lawyer and a foreign land would be the first to recognize the fact. A code is the spirit of the civil law pure and simple, and should be interpreted to accord with the maxims inherited directly from Rome. Thus it is that:

"Through the ages one increasing purpose runs."

Our equity practice which we have regarded as purely English, is merely the outcome of the philosophy of the maxims. One of the greatest of modern chancellors, Judge Murray F. Tuley, went so far as to say that, "the maxims are so comprehensive, so broad, so fruitful, so elastic, and inculcate so pure a morality that I have sometimes thought that possibly the world would be better off if we could burn all our text books upon equity jurisprudence, and ninety-nine per cent of the reports and preserve only those grand, wise, comprehensive pure and beautiful maxims with which to redress civil wrongs and enforce all civil rights as between man and man." As Judge Tuley sat for over thirty-five years as chancellor on the circuit bench of Cook county (Chicago) Illinois, administering law and equity day after day with a discrimination which made him famous, it is not by any means out of place to attribute the secret of his success, to a profound knowledge of the maxims and their relationships. It is certain that such a tribute to them could only have come from a deep appreciation of their utility in his daily vocation. It is understood that David Dudley Field was greatly disappointed with the interpretation put upon the code by the state courts. The result of such interpretation has been to make them breathe the rigid spirit of the common law. This was the natural result of the teaching of Coke and Blackstone who gave equity the position of being auxiliary to the common law. So the common law idea became dominant in our jurisprudence, and when the codes were established the common law spirit took possession of them, whereas the spirit of equity was intended to be breathed into and out of a code.

Had the codes been interpreted to accord with maxims, we would have had an entirely different character of jurisprudence. We would have had the very ideal of Bacon. We have but to recall what we quoted from Judge Tuley, as to the maxims, to appreciate the grandeur of a jurisprudence which would have had all the force of the common law and

the justice of equity. This brings us face to face with a need of the inculcation of such a jurisprudence into the students of our law schools, and this means a new literature.

We will soon present the series of articles by Mr. William T. Hughes, of Chicago, which we have heretofore promised, which we believe will be found to be the most interesting and profound which have ever appeared in any journal in this country. We believe they present ideas which will open a new and grander view to the profession of the possibilities to which our jurisprudence may attain, and the time is ripe for reform. We need constitutional conventions in many states and a wiping out of the mixed-up jurisprudence, which has developed in them. The slate having been cleaned off a new and better procedure may be established, which should develop more uniformly than hitherto. The condition of juridical and legislative ability has gone low enough to warrant a strenuous reform movement. What we need is equity jurisprudence pure and simple.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—STATUTES MAKING IT A CRIMINAL OFFENSE TO OFFER REAL PROPERTY FOR SALE WITHOUT WRITTEN AUTHORITY OF OWNER UNCONSTITUTIONAL. — Real estate agents in our large cities will be interested to learn that statutes making it criminal to offer real estate for sale without written authority have been declared to be unconstitutional, in that it infringes the liberty of contract, which every person has with regard to any lawful calling without unreasonable restraint. The Court of Appeals of New York recently handed down a very important opinion, in which Mr. Justice Haight forcefully sets forth his views in part as follows: "The legislative determination as to what is a proper exercise of the police power, is subject to the supervision of the court and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority. Liberty, in its broad sense, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation. Health Dept. v. Rector, etc., 145 N. Y. 32; People, etc. v. Gillson, 109 N. Y. 389; Colon v. Lisk, 153 N. Y. 188; Lawton v. Steele, 152 U. S. 133; People v. Warden of City Prison, 157 N. Y. 116; Stuart v. Palmer, 74 N. Y. 183; Gilman v. Tucker, 128 N. Y. 190, 200, and authorities in each case cited.

We are thus brought to the consideration of the validity of the act and its construction under the rules referred to. It is as follows: 'In cities of the first and second class any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor.' It will be observed that its provisions not only include real estate agents and brokers, but any person who shall offer for sale real property without written authority, and that it makes no distinction between persons who are working for pay and those who are rendering their services gratuitously without any thought or expectation of compensation. Hence, it follows that if a person who has been orally requested by his neighbor to offer his real estate for sale for a sum stated should go to another person and offer the same for sale he would become a criminal under the provisions of this statute, even though he rendered the services gratuitously, without thought, wish or expectation of compensation.

The business of a real estate agent or broker or of any person who engages his services to an owner of real estate to hunt up and procure a purchaser, through advertisements or otherwise, is perfectly lawful and legitimate, and persons engaged in that business are entitled to as full a protection of their rights under the constitution as that of any other person engaged in any of the other professions, trades or occupations. It may be that there are dishonest persons engaged in the business of real estate agents, but it is equally true that dishonest persons are found in every occupation. The act in question does not purport, nor is it intended, to protect the purchaser of real property. Usually he is introduced to and concludes his purchase with the owner, but should he rely upon the false representations of the agent with reference to his authority and conclude his contract with such agent, parting with value therefor, it would be larceny, and the agent would become liable to be punished. The only object and purpose apparent is to shield the land owner from being compelled to pay for services rendered, unless the person rendering the services can show written authority therefor. In the real estate business the owner has a shield from unjust claims that does not exist with reference to many other professions, trades or occupations. The agent is not entitled to his commissions until he brings to the owner a purchaser and their minds meet upon the terms. The owner can therefore always refuse to receive or enter upon negotiations with a person introduced by a real estate broker who has not been authorized by him. If, therefore, the legislature, in the exercise of its police powers, may by this act lawfully make it a misdemeanor for a person to render services to an

owner in procuring a purchaser without his written authority, it may also provide that a lawyer should be guilty of a misdemeanor for drawing a contract for a client, or for rendering him any other service without having authority therefor in writing. It would also be competent to place like restrictions upon every employee in every trade and occupation. It is difficult to see how there could be any limitation to the power of the legislature in this direction. To our minds this is going too far. It is an arbitrary infringement upon the liberties and rights of all persons who choose to engage in such occupation. Had the act been for the purpose of regulating the business of brokerage, or a statute of frauds, a different question would have been presented, but it is neither. It relates, as we have seen, to any and every person, and instead of making the oral contract void it makes the person employed guilty of a misdemeanor and punishable as a criminal. Undoubtedly the power of the legislature to enact what shall amount to a crime is exceedingly large, but, as was said by Peckham, J., in People, &c., v. Gillson (*supra*): 'That there is a limit even to that power under our constitution we entertain no doubt, and we think that limit has been reached and passed in the act under review.' So we conclude with reference to this act."

LABOR UNIONS—A LABOR UNION WHICH PROCURES THE DISCHARGE OF NON-UNION WORKMAN FROM EMPLOYMENT BY THREATS MADE TO THE EMPLOYER, LIABLE WITH WALKING DELEGATE, WHO ACTED FOR THE UNION, AS A JOINT TORT FEASOR.—The case of Wyeman v. Deady, recently decided by the Supreme Court of Errors of Connecticut, 65 Atl. Rep. 129, presents an interesting case on the liability of labon unions for procuring the discharge of non-union workmen. It appeared from the petition that on or before the 25th of October, 1905, the defendants "maliciously and unlawfully conspired, combined, and confederated with each other, and with other persons to the plaintiff unknown, to injure the plaintiff, and to prevent him from working at his trade, and from obtaining employment," and on said day, "in pursuance of said conspiracy, willfully and maliciously, and by means of threats and intimidations, induced David R. and Frank M. Hawley to discharge the plaintiff from their employ" and "because of the threats and intimidations of the defendants" the said Hawleys, on said day, discharged the plaintiff from their employ. At that time the plaintiff was receiving wages at the rate of $3 per day. Since his discharge, it seems he had been unable to obtain steady employment, and had thereby lost a large sum of money, which he would otherwise have earned, and had been greatly injured in his business, and had been greatly damaged by the unlawful action of the defendants. The complaint is dated November 16, 1905, and claims $1,500 damages. The answer in effect denies the above-stated allegations of the complaint. The jury rendered a verdict for the plaintiff for $425 damages.

The court, in the course of a very valuable opinion, said: "The defendants contend that the record contains no evidence of the alleged conspiracy, nor of the alleged malice, at least, upon the part of the union, nor of any authority of Deady from the union to make the claimed threats; and that as it appears from the plaintiff's own testimony that he was unemployed but 86 days during the period between the day of his discharge, and the date of the commencement of this action, and could have earned but $3 a day, the damages recoverable could not have exceeded $258. Section 1296 of the General Statutes of 1902 makes it a criminal offense to threaten or use any means to intimidate any person to compel him to do or abstain from doing, against his will, any act which such person has a right to do. To deprive a workman of his employment by threatening and intimidating his employer is a criminal offense under this statute. State v. Glidden, 55 Conn. 46-74, 8 Atl. Rep. 890, 3 Am. St. Rep. 23. That one who, by such means, has so injured an employee would also be liable in damages in a civil action is not questioned in this action. When such an injury results from the execution of a conspiracy it is the wrongful act done in carrying out the concerted plan, and not the conspiracy itself which furnishes the real ground for a civil action. Savill v. Roberts, 1 Ld. Raymond, 374; Hutchins v. Hutchins, 7 Hill (N. Y.), 107. The gist, therefore, of the present action is not the alleged conspiracy, but the injury to the plaintiff caused by the unlawful acts of the defendants in procuring his dismissal by threatening and intimidating his employers. Bulkley v. Storer, 2 Day, 531. To entitle the plaintiff to a verdict against both defendants no further proof of a conspiracy was required than that they were joint tort-feasors in procuring the dismissal of the plaintiff by means of such threats and intimidation; and had the proof been that but one of the defendants so procured the discharge the plaintiff, under section 760 of the General Statutes of 1902, would have been entitled to a verdict against that one. Neither was it necessary for the plaintiff, to entitle him to a verdict under the allegations of the complaint, to prove any other malice than that which the law might imply from the unlawful act proved. The allegations of conspiracy and of malice contained in the complaint were neither of them essential to a sufficient statement of the plaintiff's cause of action. The former may be regarded either as an averment of a fact, the proof of which might aid the plaintiff in establishing a joint liability of the defendants, or like the averment of malice, as an allegation of a fact in aggravation of the injury complained of. Robertson v. Parks, 76 Md. 118, 24 Atl. Rep. 411, Garing v. Frazer, 76 Me. 37."

One of the important features of the case was the liability of the members of the

union generally as tort-feasors. Here is an apparent way of escape for a labor union from liabilities of this kind. If a labor union can put forward an execution-proof walking delegate as a scapegoat and let the judicial lightning fall upon him for all acts which he may do in their name, they will be very quick to take advantage of the opening thus afforded. But the court in the principal case very effectually closes this avenue of anticipated immunity in the following sound declaration of law: "Upon the question of whether the procurement of the plaintiff's discharge by the means alleged, was the joint act of the defendants, the testimony of the plaintiff, of his said employers, of the defendant Deady, and of other officers and members of the union, and the records of the doings at various meetings of the union were presented in the trial court. It is not our purpose to repeat that evidence here. It is sufficient for us to say of it that the record shows that there was evidence before the jury from which, in our opinion, they might reasonably have concluded that the plaintiff was discharged from his employment on account of the threats to his employers, and the means to intimidate them made and used by the defendant Deady for the purpose of compelling the plaintiff's discharge; that Deady was the business agent and so-called walking delegate of the defendant union, and did said acts not only with the knowledge and approval, but by the authority of the union. Such acts would render both defendants liable as joint tort-feasors."

On the question of damages the court is also quite unambiguous in its statement of the law. The court said: "The damages awarded are not necessarily excessive. Punitive damages might have been awarded even against the union if it either directed Deady to do the particular acts complained of, or if it afterwards approved them (Maisenbacker v. Society Concordia, 71 Conn. 369-379, 42 Atl. Rep. 67, 71 Am. St. Rep. 213), or the jury may have found, as alleged in the complaint, that the plaintiff was otherwise injured in his business, than by the loss of employment during said period."

A decision like this ten years ago would have been heralded as an innovation. Today, however, so gradual have the principles of common law conspiracy been applied to the indefensible practice of labor unions in procuring the discharge of non-union workmen, that a court which will hold a walking delegate and members of a union liable to a non-union workman, whose discharge they have procured, not only for all the actual damages which such discharged employee may have suffered, but also for punitive damages where the act is directly approved and wantonly executed, does not excite public surprise. It is certainly an epoch in the history of the country when an ordinary jury can be found who will reach such a verdict in the face of adverse influences and the usual means of intimidation.

MENTAL ANGUISH DOCTRINE IN TELEGRAPH CASES.

In discussing the law of damages, there are many interesting phases which might be profitably considered, one, in particular, of extreme interest to the profession, namely, measure of damages and elements of recovery. Under this heading are included excessive or inadequate damages; damages arising from breach of contract and in actions of tort; injuries to the person; injuries to property, etc. It is well established that the following are proper elements of recovery where damages are asked: Loss of earnings or services; an impairment or diminution of earning power; loss of time; expenses incurred; physical pain, suffering and inconvenience; permanent injuries; medical attendance, etc. The courts have universally held that these elements just enumerated are proper and legitimate elements of recovery. But there is a doctrine concerning which the courts are not agreed, namely, the doctrine of mental anguish in telegraph cases. This doctrine, as a discussion and analysis of the cases will disclose, is of recent origin, since it was formerly held to be in direct contravention of certain well established principles of the common law. An action for mental anguish, suffering and distress, disconnected with physical injury, for the breach of a contract, could not be maintained at common law.[1] The reason for this it is unnecessary here to state. The single exception to the above common law doctrine was perhaps the breach of a marriage contract, and in such cases a fiction was of course involved.

Eliminating the questions of mental anguish accompanied by physical injury, or pecuniary loss, as well as many other interesting phases of the question, we come now to a discussion of the proposition with which this paper is directly concerned: May there be a recovery for mental anguish and suffering caused by the negligent failure of a telegraph company to deliver a telegram, where no actual pecuniary damage or physical injury is shown?

As above intimated, this doctrine of mental anguish in telegraph cases is of recent origin in this country. Many jurisdictions have

[1] 9 H. L. Cas. 577.

not had occasion to pass upon the question. In those jurisdictions where the question has arisen, there is a diversity of holdings. I shall briefly review the authorities, analyze and discuss them, and attempt to formulate some conclusions regarding this more or less curious doctrine. Furthermore, an examination and careful comparison of the two conflicting lines of decisions may enable us to ascertain and conclude which is the more consistent with certain adjudicated and well recognized principles. Such a review and discussion may also show whether or not the doctrine of mental anguish in telegraph cases is becoming firmly established as a part of American jurisprudence, and if so, what inherent virtue or merit such doctrine possesses. As suggested above, this discussion will be confined and limited to telegraph cases where there is no physical injury, or pecuniary loss shown, but simply and solely mental anguish.

In the first place, that line of holdings will be considered and discussed, where mental anguish resulting from the failure or negligence of telegraph companies to deliver messages, is held to be a proper and legitimate element of damages. Before reviewing such holdings, it is proper to enumerate the reasons advanced for allowing recovery in such cases. One governing reason is, that telegraph companies are *quasi*-public corporations enjoying all the powers of private corporations and certain extraordinary privileges. Such a large share of their business and profit is derived from the acceptance of messages which involve feelings only, that it is legitimate and salutary to compel the companies to respond in damages for any breach of duty in this part of their activity; in other words, it is a breach of public duty as well as of private contract. Again, it is held that damages arising from a failure to deliver, or from a negligent transmission and delivery, were within the contemplation of the contracting parties, if the company is informed from the message itself that negligence would probably cause mental suffering and anguish. Still another theory upon which courts act in allowing damages in mental anguish cases is, that on account of the negligent breach of the contract, the plaintiff or sender of the message is entitled to recover damages for all injuries suffered as the proximate result of the company's wrongful act. In other words, mental anguish damages are held to be proximate and not remote or speculative. I will now review the cases that rely upon the above doctrine as the *ratio decidendi*.

The doctrine that mental anguish unaccompanied by physical injury or pecuniary loss, is a proper element of damages, was specifically announced in Texas in 1881.[2] Prior to this time the doctrine was not approved, either in the United States or in England. In a later case,[3] the above ruling was qualified. Since then, however, Texas has followed the ruling announced in the So Relle case, although endless litigation has ensued.[4]

Alabama follows the Texas courts and permits recovery of damages in cases of mental anguish resulting from the failure to deliver messages. In Western Union Tel. Co. v. Henderson,[5] the court holds: "As to the element of mental anguish, we think it the proximate consequence of the failure to deliver the message and that the perusal of the message would naturally suggest such consequence as likely to ensue from the non-delivery. When the sender of a message has a right to sue a telegraph company for breach of contract in failing to deliver the message, he can also recover damages for mental anguish of which said failure was the proximate cause." Other Alabama cases seem to support this doctrine.[6] Tennessee likewise adopts this view. In the Gray case,[7] the court holds: "An action may be maintained against the telegraph company by the sender of a message for mental anguish suffered by failure to deliver promptly a message; the breach being of a public duty and not of a private contract." The Tennessee courts, as well as Alabama and Texas courts, do not seem to advance reasons, but rather adopt the view arbitrarily. The Kentucky court, in a leading case, supports the same view, and fortifies itself with better and more cogent reasoning than is found in the foregoing

[2] So Relle v. W. U. Tel. Co., 55 Tex. 308.

[3] Gulf R. R. Co. v. Levy, 59 Tex. 563.

[4] Western Union Tel. Co. v. Berninger, 84 Tex. 38; Western Union Tel. Co. v. Warren, 36 S. W. Rep. 314; Gulf Tel. Co. v. Richardson, 79 Tex. 649.

[5] 89 Ala. 510, 7 So. Rep. 419.

[6] Western Union Tel. Co. v. Cunningham, 99 Ala. 314; Western Union Tel. Co. v. Adair, 115 Ala. 441; Western Union Tel. Co. v. McNair, 120 Ala. 99.

[7] Wadsworth v. W. U. Tel. Co., 86 Tenn. 695; Gray v. W. U. Tel. Co., 108 Tenn. 39.

cases.[8] In Chapman v. Western Union Tel. Co.,[9] the court holds as follows: "If a telegraph company undertakes to send a message and fails to use ordinary diligence in doing so, it is certainly liable for some damage. Why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? The injury to the feelings should be regarded as a part of actual damage. If it be said that it does not admit of accurate pecuniary measurement, equally so it may be said of any case where mental anguish enters into the estimate of injury for a wrong. If injury to the feelings be an element of actual damage in slander, libel, and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may be inflicted with impunity." The Kentucky court in the course of the decision advances strong reasoning and makes its position very clear. Other Kentucky cases[10] have reiterated this rule. The Iowa court also allows damages for mental anguish alone. In the carefully considered case of Mentzer v. Western Union Tel. Co.,[11] a case that has been widely quoted and followed, the court holds: "Damages for injuries to the feelings are given though there are no physical injuries, where a person is wrongfully ejected from a train; in actions for slander and libel; for malicious prosecution; for false imprisonment. The wrongs complained of in these cases all directly affected the feelings and injury thereto promptly resulted. But not more so than in the case at bar where the injury to the feelings is apparent. Though no physical injury is suffered, damages may be recovered for mental anguish." Other Iowa cases[12] sustain this holding. The Mentzer case is exhaustive, clear and convincing. Lack of space forbids further discussion of it here. In the Cowan case certain objections to such doctrine are met as follows: "The thought urged upon our attention that claims of this nature should be disallowed because of the impossibility of providing an exact standard or measure of compensation of injured feelings, and that recognition of such right of recovery will be followed by an enormous increase of litigation, does not impress us as a persuasive consideration. It is no more difficult to fix a compensation for mental anguish, like the one at bar, than in cases of mental suffering arising from physical injury. As to the prospect of vastly increased litigation, the fears expressed find little foundation in the judicial history of the state. The Mentzer case[13] was decided ten years ago and the present is the first occasion we have had in that decade to again consider the precise question."

In a well reasoned Nevada case,[14] which is exhaustive, the court presents this rather ingenious and conclusive argument: "The reason given in some cases why damages cannot be allowed for mental suffering alone, is that the just estimate of damage is so difficult. But if such mental suffering, accompanied by physical suffering, can and must be estimated, cannot and should not mental suffering, unaccompanied by physical suffering, be estimated and allowed for in damages?"

It is unnecessary to quote further from decisions in other jurisdictions. Suffice it at this point to observe that the following additional states uphold the above so-called "Texas doctrine," as enunciated and emphatically affirmed by Iowa, Texas, Alabama: North Carolina,[15] South Carolina,[16] Louisiana,[17] Washington.[18]

This more or less cursory review of the decisions which allow recovery of damages in cases where there is mental anguish unaccompanied by physical injury or pecuniary loss, reveals that the reasons advanced and relied upon are, abstractly stated, these: First, such damages arising from the company's negligence are held to have been in the contemplation of the contracting parties. Second, damages arising from such mental anguish, without physical injury, are just as accurately ascertainable as if such mental anguish were accompanied by physical in-

[8] *Supra.*
[9] 90 Ky. 266, 13 S. W. Rep. 881.
[10] Western Union Tel. Co. v. Van Cleve, 107 Ky. 464; Western Union Tel. Co. v. Fisher, 107 Ky. 513.
[11] 93 Iowa, 752, 62 N. W. Rep. 1.
[12] Cowan v. W. U. Tel. Co., 122 Iowa, 379.
[13] *Supra.*
[14] Barnes v. W. U. Tel. Co., 27 Nev. 438, 76 Pac. Rep. 931.
[15] Sherrill v. W. U. Tel. Co., 116 N. Car. 655; Darlington v. W. U. Tel. Co., 127 N. Car. 448.
[16] Butler v. W. U. Tel. Co., 62 S. Car. 222; Marsh v. W. U. Tel. Co., 65 S. Car. 430.
[17] Graham v. W. U. Tel. Co., 109 La. 1069, 34 So. Rep. 91.
[18] Davis v. Tacoma Ry. Co., 35 Wash. 203.

jury. Third, such injuries resulting from mental anguish are proximate results of the wrongful act, or failure to properly transmit the message.

Next, it will be interesting to inspect and analyze a few cases which promulgate a different view; namely, that mental suffering and anguish alone, unaccompanied by physical distress or injury, or pecuniary loss, is not *per se*, sufficient to sustain or support an action and cannot properly or legitimately be considered as an element of damage.

An exhaustive review of all the adjudicated cases shows that this view preponderates among American courts. The following reasons are in general given in denial of the right to recover damages where there is only mental anguish and no physical suffering or pecuniary loss: First, such a doctrine invites speculative and endless litigation. Second, such damages would necessarily be speculative and remote. Third, there is no standard by which such injuries can be compensated or even approximately measured. Fourth, such damages cannot reasonably be in the contemplation of the parties. Fifth, disappointments, annoyances, etc., would be dignified by the name "mental anguish," and as a result unreasonable and improper burdens and restrictions would be imposed upon telegraph companies.

The federal courts have at no time sanctioned the doctrine, that recovery may be had for mental anguish caused by the negligence of a telegraph company. In Western Union Tel. Co. v. Sklar,[19] the court emphatically repudiates the Texas and Tennessee doctrine and in the course of the decision gives an elaborate citation of authorities. Judge Burton, speaking for the court, holds that: "Damages for mental suffering or injury to the feelings are not recoverable. Damages for mental pain, grief, disappointment, etc., are recoverable at the common law, only when the inseparable accompaniment and result of some bodily pain. The question has been so frequently discussed in so many courts that we do not feel justified in repeating the reasoning."[20] Other decisions of federal courts reiterate this view. In the Stonsell case, the court holds: "The damages claimed are speculative and remote. Mental distress unaccompanied by physical injury is not a proper element of damages."[21] In another elaborate and well reasoned case, the court with very convincing reasoning holds: "The general rule that mental anguish and suffering, unattended by any injury to the person, cannot be sufficient for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities; by the conceded state of the general law prior to 1881, and by the uniform decisions of the federal courts. Upon principle and the weight of authority, damages cannot be recovered from a telegraph company for mental anguish resulting from simple negligence in the prompt delivery of a telegraph message, as the same are too uncertain, remote and speculative."

The United States Supreme Court seems never to have considered the question but it is highly probable that the various decisions in the federal courts[22] would be followed and affirmed. The rule is, therefore, firmly established in the federal courts that damages cannot in any event be recovered where mental anguish alone is suffered.

In the well considered case of Western Union Tel. Co. v. Rogers,[23] Mr. Justice Cooper said, in behalf of the Mississippi Supreme Court: "The difficulty of applying any measure of damages for bodily injury is universally recognized. Mental pain and anxiety the law cannot value and does not pretend to redress when the unlawful act complained of causes that alone. For such injury to the feelings the court cannot give redress. Any other rule would result in intolerable litigation."

The Missouri Supreme Court,[24] by Mr. Justice Gantt, expresses itself very forcibly and clearly upon this doctrine as follows: "If this rule is to become the law in this state in regard to this contract, shall it not apply to all disappointments and mental sufferings caused by delays in railroad trains? Telegraph companies are common carriers, so are railroad companies, and yet this court held the railroad company not liable. If we es-

[19] 126 Fed. Rep. 301.

[20] Graham v. W. U. Tel. Co., 59 Fed. Rep. 433; Stonsell v. W. U. Tel. Co., 107 Fed. Rep. 668.

[21] Western Union Tel. Co. v. Wood, 57 Fed. Rep. 471, 21 L. R. A. 706.

[22] *Supra.*

[23] (Miss.) 13 L. R. A. 859.

[24] Connell v. W. U. Tel. Co., 116 Mo. 34, 20 L. R. A. 172.

tablish the rule as to one common carrier, with what sort of consistency can we refuse to extend it to all? Is it wise to venture upon the speculative field of mental anguish without guide and without compass? We think not." Earlier Missouri cases[25] had already announced the same doctrine, but the Connell case is the most exhaustive.

Before enumerating the other jurisdictions that deny recovery in mental anguish cases, it will be profitable and instructive to consider briefly the well reasoned Minnesota case of Francis v. Western Union Tel. Co.[26] In this decision, Mr. Justice Mitchell holds as follows: "If damages of this kind are to be allowed for the breach of a contract of this character, where are we to stop? The breach of any contract, even the failure of a debtor to pay his debt at maturity, may result in more or less suffering or anxiety. Why not allow damages for mental suffering or disappointment of passengers caused by the delay of trains through the negligence of the carrier? The truth is, once depart from the old rule, and we are all at sea, without rudder or compass. Any other doctrine would work badly in practice, giving rise to a flood of speculative litigation uncontrolled by any guide as to the measure of damages, except the whim of the jury, or the arbitrary standard that may be adopted by the particular judge who tries the cause."

The Arkansas court, in a well considered case, also repudiates the Texas doctrine and denies a recovery in damages where there is mental anguish unaccompanied or unattended by physical suffering or pecuniary loss. In Peay v. Western Union Tel. Co.,[27] Mr. Justice Hughes, in the course of the decision, decisively holds as follows: "While there is considerable conflict in the adjudged cases upon this question, we are of the opinion that the better considered cases are against the right of recovery for mental pain and anguish, unaccompanied by physical injury. Damages for mental pain and suffering alone cannot be measured by any practical or just rule. No statute allows such damages. The common law does not allow them, and in our opinion, the weight of adjudication is against the right of recovery. The intolerable and interminable litigation such a doctrine would foster is beyond the reach of ordinary imagination."

It would prolong this discussion too much to comment upon the other cases that repudiate and reject the Texas doctrine announced in the So Relle Case,[28] prior to which time mental anguish was not recognized as a proper element of damages. Other jurisdictions which flatly refuse to support this doctrine are: Florida;[29] Georgia;[30] Kansas;[31] Ohio;[32] West Virginia;[33] Wisconsin;[34] Oklahoma;[35] Virginia;[36] Dakota;[37] Indiana;[38] New York.[39] A careful review of digests, reports, etc., discloses that in the following jurisdictions the principle or doctrine discussed in the above cases has not been passed upon: Montana; New Jersey; Pennsylvania; Vermont; Colorado; Arizona; California; South Dakota; Rhode Island; Utah; Massachusetts; Delaware; New Hampshire; North Dakota; Oregon; Wyoming; Maine; Michigan; Nebraska; Maryland; Connecticut; Idaho.

This review and discussion of authorities therefore shows that the doctrine of mental anguish in telegraph cases has not been genally adopted in this country. In fact, the majority of American courts very vigorously repudiate the doctrine. As to English holdings, this discussion is not concerned and yet it is interesting to note the trend of opinion there. In several cases the doctrine that mental anguish alone is a proper element of damage, is unequivocally rejected.[40] In the Allsop case, Pollock, C. B. said: "We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply and

[25] Burnett v. W. U. Tel. Co., 39 Mo. App. 599; Newman v. W. U. Tel. Co., 50 Mo. App. 434.
[26] 58 Minn. 252, 25 L. R. A. 406.
[27] 64 Ark. 538, 39 L. R. A. 463.
[28] *Supra.*
[29] Inter. Nat. Tel. Co. v. Saunders, 32 Fla. 434.
[30] Chapman v. W. U. Tel. Co., 88 Ga. 763, 17 L. R. A. 430.
[31] West v. W. U. Tel. Co., 39 Kan. 93.
[32] Morton v. W. U. Tel. Co., 53 Ohio St. 431.
[33] Davis v. W. U. Tel. Co., 46 W. Va. 48.
[34] Summerfield v. W. U. Tel. Co., 87 Wis. 1.
[35] Butler v. W. U. Tel. Co., 2 Okla. 234.
[36] Connelly v. W. U. Tel. Co., 100 Va. 51.
[37] Russell v. W. U. Tel. Co., 3 Dak. 315.
[38] Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. Rep. 674.
[39] Curtin v. W. U. Tel. Co., 42 N. Y. Supp. 1109.
[40] Lynch v. Knight, 9 H. L. Cas. 498; Allsop v. Allsop, 5 Hurlst & N. 534; Hobbs v. London R. Co., 10 Q. B. 111.

what a dangerous use might be made of it." The question, therefore, seems to be no longer an open one in England, no departure from the common law being sanctioned.

Counsel in one of the adjudicated cases[41] offers an interesting remark which may be noted here. He rather eloquently and ingeniously states: "Man had suffered all kinds of mental injury at the hands of his neighbors for centuries—his hopes had been disappointed, his pride had been humbled, his anger had been aroused; he had been frightened, grieved, and subjected to every conceivable form of mental discomfort—but such wrongs had never been made the subject of compensation in damages until 1881 in the So Relle case in Texas." Another counsel in his brief states the question rather pointedly, as follows: "Are the barriers to be thrown down and every disappointment, annoyance, vexation or anxiety be made the subject of an action for mental anguish? In other words, this case baldly presents the question whether any annoyance, disappointment, vexation or anxiety on account of a missing friend at the station or from some other cause, can be dignified by the name of mental anguish, and adjudged to rank in the same class with the poignant grief arising from the failure to reach the bedside of a dying wife in time to receive the last adieus."

To recapitulate briefly, the reasons extracted from the cases for adopting and indorsing the doctrine that damages for mental anguish independent of and unattended by physical suffering or pecuniary loss, can be recovered for delay in transmitting or delivering a telegram are these: First, telegraph companies are *quasi*-public corporations or agencies; are charged with a public duty as well as a private duty to the contracting parties, and being so charged, they may be held liable for mental anguish and suffering, due to the company's negligence. Such damages are recoverable to impress upon the companies their public duty, especially since the violation of that duty will result more often in mental anguish and distress, than in pecuniary loss or physical suffering. Second, such damages are held to have been within the contemplation of the contracting parties. Third, the mental anguish is a direct, proximate cause of the company's negligence, and damages therefor are not remote or speculative. Fourth, damages in case of mental anguish, unaccompanied by physical suffering, are ascertainable with just as much accuracy as in cases where the mental anguish is attended by physical suffering. Fifth, mental anguish should constitute an element of compensatory damages, because "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter."

Abstractly stated and summarized, the reasons advanced in the cases repudiating the recovery of damages in mental anguish cases are these: First, damages in such cases are necessarily remote and speculative. This is explained by the metaphysical and intangible character of the injury. Second, such damages are "sentimental, vague and shadowy, rather than substantial." There is no standard by which such damages can be ascertained or accurately computed and measured. The suffering and mental distress of one would be no test in the case of another. Third, the adoption of such a doctrine will result in speculative, "intolerable and interminable" litigation. Fourth, if such a rule or doctrine is adopted and enforced as to telegraph companies, where can the line be properly drawn? If established and enforced as to one common carrier, with what consistency can other common carriers be excepted?

It is apparent, after this review of the authorities, that the courts are in direct conflict on this question of recovery in mental anguish cases. I shall not attempt a reconcilement, because it is manifestly impossible. For instance, some well reasoned cases hold that such damages would be speculative, remote and difficult of ascertainment. Other cases, equally as well reasoned it seems to me, hold that such damages are proximate and may be ascertained with just as much accuracy as in other cases. These and other disagreements simply cannot be harmonized.

This doctrine of mental anguish in telegraph cases arose in 1881, and is, therefore, of comparatively recent origin. It is undoubtedly subversive of certain fundamental common law principles. Upon the question as to whether or not the doctrine possesses such merit as to justify its adoption as a part

[41] *Supra.*

of our general jurisprudence, the courts are not agreed. A careful analysis of the authorities forces me to the conclusion that the cases repudiating and rejecting the doctrine are perhaps better considered cases and are fortified with clearer and more convincing reasoning. To my mind, the following inquiries are difficult to answer, in case the doctrine is accepted: Will it not invite and be a source of prolific and interminable litigation? Is it not extremely difficult to define the term "mental anguish" and are injuries of such a nature really substantial, when unaccompanied by all physical suffering? Why should telegraph companies be singled out and other public, or *quasi*-public agencies excluded? Would not such a radical departure and doubtful innovation give too much latitude to juries where there is no guide or standard, by which such damages can be measured? On the other hand, it is argued with considerable force that mental anguish is often more acute than physical suffering; if such anguish is a proper element of damages when attended by physical suffering why may it not be so considered when unattended by physical suffering? Since telegrams generally relate to matters of feeling, etc., may not damages resulting from mental anguish be said to be within the contemplation of the contracting parties at the time? Many other interesting phases of the question suggest themselves, such as the following: Can both sender and sendee recover? Does the action sound in contract or tort? To what extent must the message show on its face the family relationship, etc.? Are such damages punitive or compensatory? Do worry, anxiety, etc., constitute "mental anguish?" How much mental anguish or suffering shall be necessary to constitute a cause of action, and who is to be the judge? Is it not a remarkable departure from old land marks and precedents to undertake to redress psychological injuries, unconnected with other injuries? These and other interesting questions cannot be treated here.

In conclusion it may be observed that there is a divergence of holdings on many principles and doctrines of law, such as in this case. No reconcilement is possible, and the truth and force of the following wise observation becomes apparent: "Variety of judgments and novelty of opinions are the plagues of a commonwealth."[42] Lord Kenyon's sage remark preserved by Chancellor Kent[43] may also appropriately be quoted here: "It is my wish and my comfort to stand *super antiquas vias*. I cannot legislate, but by my industry, I can discover what my predecessors have done and I will tread in their footsteps." "*Misera est servitus, ubi jus est vagum aut incertum.*"[44]

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[42] Co. Litt, 282 b, sec. 485.
[43] 1 Kent, Com. 477, 490.
[44] Coke, 4th Inst. 246.

REFORMATION OF CONTRACT IN EQUITY AFTER DENIAL OF RELIEF AT LAW.

NORTHERN ASSURANCE COMPANY OF LONDON v. GRAND VIEW BUILDING ASSOCIATION.

Supreme Court of the United States, Nov. 5, 1906.

Where equitable relief is granted by a state court, the sufficiency of the grounds on which the relief was granted is not reviewable by the Supreme Court of the United States in error to the state supreme court.

The denial of relief in an action at law is not an adjudication that the contract sued on cannot be reformed and relief had in equity.

A judgment denying relief in an action at law on a contract, as an adjudication, merely establishes one of the propositions on which the plaintiff must rely in thereafter seeking equitable relief to recover on the same contract, namely, that recovery cannot be had on the contract as it stands.

Where the courts of a state and the federal courts therein have theretofore exercised jurisdiction to administer equitable relief in actions at law, a citizen of the state, by seeking equitable relief in an action at law instituted therein, does not thereby make an election of remedy, so as to bar the maintenance of a suit in equity to reform the contract sued on and recover upon it as reformed, merely because the equitable relief was denied in the action at law by the Supreme Court of the United States, wherein equitable relief is accounted unenforceable in actions at law.

A judgment of the United States Supreme Court in an action at law on a policy of insurance denying the right of the insured to establish an estoppel of the insurer and a waiver of provisions of the policy for forfeiture thereof, based on the knowledge of the agent of the insurer as to other insurance, consent to the existence of which was not indorsed on the policy, as required by its terms to maintain its validity, is not denied full faith and credit by a decree of a state court in an equity proceeding thereafter instituted reforming the policy and permitting a recovery thereon as reformed on the same facts that were established in the action at law.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is a bill to reform a policy and to recover upon it as reformed. An action at law upon the same instrument, between the same parties, has come before this court heretofore. 183 U. S. 308, 46 L. Ed. 213, 22 Sup. Ct. Rep. 133. In that case it was held that the plaintiff could not recover. The question before us at the present time is whether the supreme court of Nebraska failed to give full faith and credit to the judgment in the former case by holding that it was no bar to the relief now sought. (Neb.), 102 N. W. Rep. 246.

The policy was conditioned to be void in case of other insurance, unless otherwise provided by agreement indorsed or added; and it stated, in substance, that no officer or agent had power to waive the condition except by such indorsement or addition. There was other insurance and there was no indorsement. The plaintiff alleged a waiver and an estoppel. The jury found that the agent who issued the policy had been informed on behalf of the insured and knew of the outstanding insurance. But this court held that the attempt to establish a waiver was an attempt to contradict the very words of the written contract, which gave notice that the condition was insisted upon and could be got rid of in only one way, which no agent had power to change. The judgment based upon this decision is what is now relied upon as a bar. Metcalf v. Watertown, 153 U. S. 671, 676, 38 L. Ed. 861, 863, 14 Sup. Ct. Rep. 947; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 645, 44 L. Ed. 619, 621, 20 Sup. Ct. Rep. 506.

Whether sufficient grounds were shown for the relief which was granted is a matter with which we have nothing to do. But the state court was right in its answer to the question before us. The former decision, of course, is not an adjudication that the contract cannot be reformed. It was rendered in an action at law, and only decided that the contract could not be recovered upon as it stood, or be helped out by any doctrine of the common law. If it were to be a bar it would be so, not on the ground of the adjudication as such, but on the ground of election, expressed by the form in which the plaintiff saw fit to sue. As an adjudication it simply establishes one of the propositions on which the plaintiff relies,—that it cannot recover upon the contract as it stands. The supposed election is the source of the effect attributed to the judgment. If that depended on matter *in pais* it might be a question, at least, as was argued, whether such a case fell within either U. S. Const. art. 4, § 1, or Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677. It may be doubted whether the election must not at least necessarily appear on the face of the record as matter of law in order to give the judgment a standing under Rev. Stat. § 905.

We pass such doubts, because we are of opinion that, however the election be stated, it is not made out. The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies. It did not demand a judgment without regard to them and put them on one side, as was done in Washburn v. Great Western Ins. Co., 114 Mass. 175, where this distinction was stated by Chief Justice Gray. Its choice of law was not an election, but an hypothesis. It expressed the supposition that law was competent to give a remedy, as had been laid down by the supreme court of Nebraska and the circuit court of appeals for the circuit. Home F. Ins. Co. v. Wood, 50 Neb. 381, 386, 69 N. W. Rep. 941; Fireman's Fund Ins. Co. v. Norwood, 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. Rep. 71. So long as those decisions stood the plaintiff had no choice. It could not, or at least did not need to, demand reformation, if a court of law could effect the same result. It did demand the result, and showed by its pleadings that the path which it did choose was chosen simply because it was supposed to be an open way. Snow v. Alley, 156 Mass. 193, 195, 30 N. E. Rep. 691.

A question argued as to the obligation of the contract having been impaired by a statute as construed was not taken below, and is not open here.

Decree affirmed.

NOTE.—*The End of the Most Important Insurance Litigation Ever Heard In the National and State Tribunals.*—The Supreme Court of the United States has spoken again in the great insurance case, which was adverted to in these columns shortly after the opinion in Northern Assurance Co. v. Grand View Building Ass'n, 102 N. W. Rep. 246, was handed down by the Supreme Court of Nebraska, under the heading, "A Most Interesting Chancery Sequel to a Noted Insurance Case at Law," 60 Cent. L. J. 484. The case bears the same title in national tribunal and is reported in 27 Sup. Ct. Rep. 27. It will be remembered that the first opinion by the United States Supreme Court held that no recovery could be had on a fire insurance policy where other insurance was taken without the insurer's consent indorsed on the policy, as required by its terms, to maintain its validity, though the insurer's agent who issued the policy had been informed on the part of insured and knew of the other insurance. In other words, the court held that parol evidence was inadmissible to vary the terms of the policy. The very stringent provision of the standard fire policy of New York and other states limiting the powers of agents was set forth in the opinion and so commented upon that it seemed as though the court had placed a menacing precedent in the way of policy-holders, and had made it hardly worth while to carry fire insurance under a standard form of fire insurance policy, because, as is well known, a loss could hardly occur which would not be subject to the interposition of a defense, based on the violation of some of the multitudinous provisions of the policy for forfeiture, which would prevent recovery. Now all the danger is removed from the case, practically, by this present holding, in affirmance of the Nebraska Supreme Court's decision, permitting a recovery on the same policy, under a prayer for reformation to show the facts in relation to the agent's knowledge of the other insurance. It was assumed apparently by the Nebraska Supreme Court that the

national tribunal would be disposed to find some means of circumventing the recovery, as the opinion contained many critical allusions to the doctrine enunciated by the United States Supreme Court. The danger of the plaintiff's case lay in the holding of the United States Supreme Court being declared *res judicata* or else in plaintiff's misfortune in having foreclosed its case by the choice of the remedy at law. On these difficult points the United States Supreme Court, through Mr. Justice Holmes, says: "The former decision, of course, is not an adjudication that the contract cannot be reformed. It was rendered in an action at law, and only decided that the contract could not be recovered upon as it stood, or be helped out by any doctrine of the common law. If it were to be a bar it would be so, not on the ground of the adjudication as such, but on the ground of election, expressed by the form in which the plaintiff saw fit to sue. As an adjudication it simply establishes one of the propositions on which the plaintiff relies—that it cannot recover on the contract as it stands. The supposed election is the source of the effect attributed to the judgment. * * * The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies. It did not demand a judgment without regard to them. * * * Its choice of law was not an election, but an hypothesis. It expressed the supposition that the law was competent to give a remedy, as had been laid down by the Supreme Court of Nebraska and the circuit court of appeals for the circuit. * * * So long as those decisions stood the plaintiff had no choice. It could not, or at least did not need to, demand reformation, if a court of law could effect the same result. It did demand the result, and showed by its pleadings that the path that it did choose was chosen simply because it was supposed to be an open way."

An understanding of this litigation constitutes a very valuable training in insurance law. Those courts which have so wrothily animadverted upon the former opinion of the United States Supreme Court will have occasion now to become calm. The insurers who had a good right to feel elated have now to consider that the contract of insurance is not yet, and is probably incapabable of being so molded as to enable them to interpose defenses which give affront to equity and good conscience, with any absolute assurance of ultimate victory. Whereas it did appear that all insurance cases involving $2,000 or over, pending between persons of diverse citizenship, could be removed to the federal courts from the state courts, and victory thus snatched from almost certain defeat, now the removal does not warrant any such inference. If mistake shall be made in future in bringing an action at law in a state court on a policy that must first be reformed in equity, this case stands as a precedent that the action at law does not constitute an election of remedy barring the equitable action nor the judgment at law a binding adjudication which interferes with a decree in equity favorable to a reformation. It also stands as a precedent that the powers of an insurance agent to bind his principal are no different from what has been the generally accepted doctrine; that is, that he may waive the policy provisions by parol, notwithstanding the policy declares that no such waiver shall be binding. In other words, all those provisions for forfeiture are placed in the keeping of the agent who deals with the insured, and when the insured now says to the agent that a certain provision is inimical to his interests and he would like a waiver of it, the agent's agreement then and there made to waive it on the part of the insurer binds the insurer, though the agreement be not indorsed on the policy, as required by its terms to maintain its validity, but in such cases the insured must first seek relief in equity, unless he is sure that the cause cannot be gotten into the federal courts and sure that his own state court will not become convinced that the national tribunal's doctrine in this matter is the proper one to follow and, perhaps, limit or overrule some of its own former decisions. It is well known that though a state may abolish all distinctions between actions at law and suits in equity, yet the procedure remains quite the same in the pursuit of equitable relief. It is generally held in such states that equitable relief cannot be granted unless the pleadings have been so framed as to permit of it, while the United States Supreme Court holds that though equitable relief may be granted under the laws of a state in an action at law, yet when litigation arises in such state and is removed into the federal jurisdiction, the doctrine of the federal courts that equitable relief in actions at law cannot be granted applies. Perhaps the court would not admit that it has so held, but that that is the effect of the decision cannot well be denied. Certainly Nebraska is under no obligation to change its former rulings to that effect, and in any case arising in that state and confined to the state courts, there is no doubt but that the supreme court of the state will recognize the former ruling as the precedent rather than the decision of the United States Supreme Court. Nebraska is not alone in this, for at least a half dozen state supreme courts have repudiated the holding of the United States Supreme Court, stating that while they have great respect for its decisions, they will not overturn their own to fall in line with the federal courts.

The question may arise as to the righteousness of the first decision of the Supreme Court of the United States in this insurance litigation, denying a recovery in an action at law on the same policy and the same facts that it now affirms a recovery upon in equity. It is hardly worth while to discuss the righteousness of the decision, since the court has redeemed itself largely by the later holding, but it is unfortunate that the court felt disposed to go out of its way to overturn long established precedents of many of the states, and of other federal courts, even if it didn't overrule itself to such an extent as that great court's decisions may affect state courts. No one can read the opinion, leaving out of consideration the subsequent holding in the equity suit, without becoming quite convinced that the court meant to become quite a teacher to the lawyers and judges of the country. It seemed to lose sight of the jurisdiction of a court of law to prevent the consummation of a fraud, which an absolute denial of recovery would have amounted to in the instant case. Whether the court chose to call the basis of relief equitable estoppel or fraud would make very little difference. The facts are astutely not set forth in the later opinion, but are covered with the statement that, "whether sufficient grounds were shown for the relief which was granted is a matter with which we have nothing to do." Going back to the former opinions, it is clear that estoppel or fraud is the basis of relief. The agent was informed on the part of the insured and knew of the other insurance. These are the only facts which appear to have been shown in the equity suit as ground for relief. There is no showing that the relief was granted on the basis of mutual mistake or accident, and the only other basis for the interposition of equity is fraud. If the fraud

be denominated equitable estoppel, it is difficult to see that we get any different effect. If it were fraud that gave the Nebraska courts jurisdiction in equity, the national court had jurisdiction for the same reason only, if it had jurisdiction at all. If the fraud were sufficient to give equity jurisdiction, why was it not sufficient to have enabled a court of law to prevent its interference with recovery? Is there a dividing line that just a little fraud gives equity jurisdiction, while all quantities of fraud above that give courts of law jurisdiction? The text-books and decisions may be searched in vain for an affirmative answer. Then the Supreme Court of the United States committed a grievous mistake in its first decision and it is well for its reputation that the opportunity was offered and accepted, with apparent alacrity, to redeem itself. If it could but do likewise in its construction of the New York statute in reference to forfeitures of life insurance policies for nonpayment of premium (to make a slight departure from the subject in hand), all would be forgiven it, but, as in this fire insurance litigation, it therein succeeded in overturning, or at least, in partially obstructing the enforcement of precedents established in many of the state courts. Nevertheless, the state courts, in recent decisions in the matter of the application of the New York statute make their bow of respect to the national tribunal but beg to be excused from following its lead.

We have a most intricate system of judicature when we come to think of it. Laying aside the common law and equity distinctions that must be constantly borne in mind hereafter, we have the state court administering its own law, recognizing its own precedents, and enforcing the statutes of other states in relation to persons or corporations from such other states doing business within its boundaries, and then we have the federal courts within the same jurisdictions administering diametrically opposed precedents and necessarily, when applying them, tearing down that which the state has built up, and then the state, when the opportunity is afforded and when recourse for review in the federal court is not at hand, disapproving the precedents established by the highest court in the land and rehabilitating its own disavowed precedent, and discoursing upon the great deference due the national tribunal, with apologies for not showing the deference which is admitted should be accorded! The instant case is illustrative.

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JETSAM AND FLOTSAM.

TRANSFER TAX; ASSESSMENT OF SHARES OF STOCK IN A CORPORATION ORGANIZED UNDER THE LAWS OF TWO STATES.

In appraising the value of shares of stock to ascertain the amount of tax to be imposed under the New York transfer tax law, an interesting question was presented to the Court of Appeals of that state in the case of Cooley v. The Comptroller, 78 N. E. Rep. 939. The law provides for a tax upon the transfer by will or intestate law of any property or interest therein over a certain value when the decedent is a non-resident of the state at the time of his death. In this case the decedent was a resident of Connecticut. He transferred by will shares of stock in the Boston & Albany Railroad Company, a consolidated corporation organized under the laws of both New York and Massachusetts. The question presented to the court was whether in making the assessment the state of New York should recognize the full value of the shares held by the decedent, or whether it should limit the tax to a portion of the total value upon the theory that the company holds its property in Massachusetts at least under its incorporation in that state.

It would seem by an examination of former decisions rendered by the New York courts that a conclusion could be reached without much difficulty. Though this precise question had not previously been presented, yet in the late case, *In re* Palmer's Estate, 76 N. E. Rep. 13, it was said by Judge Gray that a share of capital stock represents the distinct interest which its holder has in the corporation. That his right to participate in the distribution of the net earnings of the corporation as a going concern or in its assets upon dissolution, is proportionate to the number of shares which he holds; these evidence the extent of his proprietary interest and their assessment for taxation purposes must be upon that interest regarded as an entity and is unapportionable with reference to the *situs* of the corporate properties. Adding to this opinion of Judge Gray the fact that a consolidated corporation organized under two or more states, by seeking the aid of the laws of New York and being incorporated thereunder, is considered a domestic corporation therein (Matter of Sage, 70 N. R. 220), it would seem that the same result must follow in the assessment of this present tax as where shares are held in a corporation incorporate alone under the laws of New York and holding property outside the state. *In re* Bronson, 150 N. Y. 1. The court, however, adopted a contrary doctrine which seems to be based upon the equitable view that otherwise stockholders would be subjected to hardship. It is pointed out that if New York levied a tax assessed upon the full value of the shares, the other states of incorporation might do the same, resulting in double taxation. Such taxation courts should avoid whenever it is possible within reason to do so and all presumptions are against its imposition. Tennessee v. Whitworth, 117 N. S. 129. "The law of taxation is to be construed strictly against the state in favor of the taxpayer as represented by the executor of the estate. Matter of Fayerweather, 143 N. Y. 114."

This is undoubtedly true, but we respectfully submit that the learned court has seemed to lose sight of the particular law by virtue of which this assessment is made and the construction of which is called for by this decision. The history of legislation upon this subject in New York and elsewhere shows a desire to remedy the fact that as a general rule the great bulk of personal property escapes taxation during the life of the owner, since from its very nature it can be readily concealed. And it was in regard to a message to the legislature by the chief executive of that state calling for some additional tax law to remedy this evil that the first of a series of acts was passed of which the present is the culmination. Opinion by Judge Vance in Bronson's Case, 150 N. Y. 1. Among other provisions the law now in force provides for the tax of the transfer by will of property within the state as above stated, the word property being afterward defined to include "all property or interest therein whether situated within or without this state." Laws of 1898, ch. 88, § 242. Thus plainly intending to make the tax as sweeping in its results as possible. Since, therefore, the state has complete power to tax the transfer of stock as property at its true value when

such shares are held in corporations organized under its laws regardless of where their property is situated Plummer v. Coler, 178 U. S. 115), it would seem that such was the plain and undoubted intention of the legislature in the present instance. And this being the case, the presumption against the possibility of double taxation is rebutted. If such a construction will operate harshly upon certain individuals the remedy is not with the courts but rather with the legislature for a change in the enactment.

There is no case to our knowledge which has decided this identical question. The New York court considers Moody v. Shaw, 173 Mass. 375, and says that the opinion in that case does not seem to warrant a construction to the effect that such a transfer of shares as here under consideration would be taxed according to their full value. There the corporation involved was also the Boston and Albany Railroad. It is true that this precise point did not arise and the opinion is very short. But a careful consideration of that case leads one to draw the inference that in that state the transfer of such shares of stock for the purpose of taxation, would be assessed as shares in any domestic corporation regardless of the situation of the corporate property and incorporation elsewhere.—*Yale Law Journal.*

CORRESPONDENCE.

NEXT ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION.

Editor of the Central Law Journal:

The Executive Committee, at its meeting in New York on December 28th, determined to hold the annual meeting of the American Bar Association at Portland, Maine, on Monday, Tuesday and Wednesday, August 26, 27 and 28, 1907. The reason for selecting Monday, Tuesday and Wednesday is that the International Law Association is considering holding its meeting in America this year, and the suggestion has been made to that body to hold its meeting at Portland on the last three days of said week.

If you think proper to make this announcement in your paper, by way of a news item of interest to the Bar, I shall be very glad to have you do so.

Very truly yours,

Baltimore, Md. JOHN HINKLEY,
Secretary American Bar Association.

BOOK REVIEWS.

JONES ON TELEGRAPH AND TELEPHONE COMPANIES.

This work seems to be well and thoroughly done. The text evidences a vast amount of labor in the preparation of it. The diction is simple and to the point. It is certain that the domain of telegraph and telephone companies must extend to ever-widening fields for a long time to come. The range of possibilities for such organizations is not a part of the contemplation of the average man, but so far as they have been extended into practical use this book is calculated to cover, and the very great recent development of the law in regard to these subjects makes it plain why such a work has been produced. The author confidently states that every principle of law applicable to these companies has been carefully and fully set forth. He says: "How well we have succeeded in this task must be judged from the work itself." We have examined enough of the text to confidently asseverate that he has not misstated the fact when he says, every principle of law applicable to these companies has been carefully and fully set forth. The array of cases cited is earnest of what may be expected of the text. We cheerfully commend it to the profession.

It is published in one volume by the Vernon Law Book Co. of Kansas City, Mo., and contains 833 pages, well bound.

AMERICAN DIGEST 1906 A.

The present volume of the American Digest, now before us for review, covers, "without omission or duplication," all the current decisions of all the American courts, as reported in the National Reporter System, the Official Reports, and elsewhere, together with important English cases, from October 1, 1905 to March 30, 1906. It evidences the same superior excellences that distinguishes all the other volumes of this superb and incomparable system of digesting. It might be interesting to the profession to know what are the most frequent points of law which arise in appellate jurisdictions. By a count of the number of paragraphs under each general subject of law it is found that the largest number under any one general heading is 1971, under the heading of Appeal and Error; the next largest, 1433, under Criminal Law, and the third largest, 1003, under Municipal Corporations. These are the only three headings having more than one thousand paragraphs. It will probably surprise some lawyers that subjects like Carriers or Master and Servant should not be in the front rank. The general subjects of law containing more than five hundred paragraphs are as follows: Master and Servant, 987; Carriers, 804; Trial, 762; Evidence, 718; Railroads, 585; Insurance, 573, and Wills, 524.

Printed in one large volume of 4455 pages, and published by the West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

Report of the Twenty-Ninth Annual Meeting of the American Bar Association Held at St. Paul, Minnesota, August 29, 30 and 31, 1906. Philadelphia: Dando Printing and Publishing Company, 34 South Third Street, 1906.

Forms of Common Law Declarations, for Use in State and Federal Courts. By George C. Gregory, of the Richmond, Virginia, Bar. Author of Gregory's Forms (for Virginia and West Virginia), and Sometime Associate Editor of the Virginia Law Register. Published by the Author. For Sale by Central Law Journal Company. Sheep. Price $5.00. Review will follow.

The American Lawyer as he was—as he is—as he can be. By John R. Dos Passos, of the New York Bar. Author of "The Law of Stock Brokers & Stock Exchanges," "Interstate Commerce Act," "Commercial Trusts," "The Anglo-Saxon Century," etc., etc. The Banks Law Publishing Co., New York, 1907. Buckram. Price $1.75. Review will follow.

HUMOR OF THE LAW.

George Small of Norway, Me., a painter, used occasionally to look upon "the ardent." At one time he was summoned to testify in a case in court. Being somewhat under the influence of liquor, his speech

was rather thick, and, to make matters worse, he directed his conversation to the attorney questioning him, so the jury could not understand half of what he said.

Finally the judge turned to him and said: "Mr. Witness, speak louder, and address the jury."

"Upon what subject, your honor?" asked Small.

The judge joined in the laughter which followed.

Jean Libau was an old French cook who in his wanderings stumbled upon a prosperous Maine town, and decided to set up business in an old roadhouse which had been vacant for several months. The Frenchman met with marked success; but being of a rather miserly disposition, he was much annoyed by a very eccentric and also saving neighbor who lived about a mile away. This man had formed a habit of coming down twice a day to catch the spicy and wholesome odors wafted from Jean's kitchen, and for many months he claimed they kept him thriving and hearty.

This bothered Jean greatly, and he brought the matter before the court. When the case came up for trial the judge inquired of the defendant the amount of cash he had on his person, and on receiving the reply, "A half, a quarter and a dime," requested that it be handed over to him.

After jingling the coin loudly in his hand for a moment, his honor asked the plaintiff whether, in his opinion, he had received justice, and the cook answered that he had not.

"Well," said the judge, "he smelled your dinner and you've heard the chink of his money, and that is the nearest I can come to what is popularly known as the square deal in this case."—*Boston Herald.*

Miss Annie Ide (now Mrs. W. Bourke Cockran) celebrates her birthday on November 13 instead of December 25, the actual date of her birth. The birthday was formally presented to her by Robert Louis Stevenson, the author, under unique circumstances.

When she was a little girl she was in Samoa with her father, Henry Clay Ide, who went there as United States Commissioner, later becoming Chief Justice of Samoa. There Annie Ide, a small girl in pinafores, spent much time at the Stevenson bungalow. Complaining of her lack of birthdays, Mr. Stevenson came to the rescue, and the next day Mr. Ide received a document of which the following is a part:

"I, Robert Louis Stevenson, advocate of the Scots Bar, author of 'The Master of Ballantrae' and 'Moral Emblems,' civil engineer, sole owner and patentee of the palace and plantation known as 'Vailima,' in the island of Upola, Samoa, a British subject, being in sound mind and pretty well, I thank you, in body;

"In consideration that Miss Annie H. Ide, daughter of H. C. Ide, was born out of all reason upon Christmas day, and is therefore out of all justice denied the consolation and profit of a proper birthday: And, considering that I, the said Robert Louis Stevenson, have attained such an age that I have now no further use for a birthday: And in consideration that I have met H. C. Ide, the father of the said Annie H. Ide, and found him about as white a land commissioner as I require: Have transferred to the said Annie H. Ide all and whole my rights and privileges in the thirteenth day of November, formerly my birthday, now hereby and henceforth the birthday of the said Annie H. Ide, to have, hold, exercise and enjoy the same in the customary manner by the sporting of fine raiment, eating of rich meats and receipts of gifts, compliments, and copies of verse, according to the manner of our ancestors."—*Selected.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACTION—Trover and Conversion —An owner of personalty converted by another cannot waive the tort and recover for money had and received unless there has been a sale of the property by the latter.—Southern Ry. Co. v. City of Attalla, Ala., 41 So. Rep. 664.

2. ADOPTION—Consent of Parents.—Where no guardian was appointed for a minor child in adoption proceedings, it was necessary that both parents should consent to the adoption, as required by Ballinger's Ann. Codes & St. § 6450.—State v. Wheeler, Wash., 86 Pac. Rep. 394.

3. ADVERSE POSSESSION—Effect of Payment of Tax.—Proof that a person for 11 years paid taxes on a tract of land raises no presumption of possession by him of the land.—Lutcher v. Allen, Tex., 95 S. W. Rep. 572.

4. APPEAL AND ERROR—Award of Damages by County Commissioners.—Party appealing to the district court from an award of damages made by a board of county commissioners, though not required to file a petition, held bound by allegations of petition filed.—Walbridge v. Board of Com'rs of Russell County, Kan., 86 Pac. Rep. 478.

5. ANIMALS—Inspection Laws.—An information under Sess. Laws 1905, p. 823, ch. 495, § 27, relating to the inspection by the live stock "sanitary commissioner" of cattle, which charges a want of inspection by the "sanitary commission," is not invalidated by the omission of the terminal syllable "er" from the word describing the official having power to inspect.—State v. Asbell, Kan., 86 Pac. Rep. 457.

6. APPEAL AND ERROR—Parties Entitled to Allege Error —The failure to appoint an attorney to represent a defendant in the trial court does not affect the jurisdiction thereof, but is an irregularity of which such defendant alone can complain.—Stith v. Moore, Tex., 95 S. W. Rep. 587.

7. APPEAL AND ERROR—Review.—Where it appears to the court that plaintiff has failed to make out his case, and a verdict is directed, the plaintiff not moving to be allowed to dismiss or to take a nonsuit, the supreme court will allow the verdict to stand.—Watson v. Barnes, Ga., 54 S. E. Rep. 723.

8. ARREST—Authority Without Warrant.—One held not guilty of theft so as to authorize an officer to arrest him either on the theory that a theft was committed in view of the officer or on the theory that he was in possession of stolen property, authorizing an arrest under Code Cr. Proc. art. 364.—Martin v. State, Tex., 95 S. W. Rep. 501.

9. APPEAL AND ERROR—Failure to Show Error.—Where the record on appeal does not show that a motion to

dismiss for alleged failure to file a bond for costs within the time allowed was supported by affidavit or any other form of proof, an order denying the motion cannot be interfered with.—Goodykoontz v. Imes, Colo., 85 Pac. Rep. 889.

10. BANKRUPTCY—Claim Against Third Party.—Where a bankrupt purchased a claim filed in his schedules as against P, he was not thereafter entitled to sue P's wife to enforce her alleged liability as an undisclosed principal.—Shesler v. Patton, 100 N. Y. Supp. 286.

11. BANKRUPTCY—New Promise to Pay Note.—Rev. St. 1899, § 3706, held not to render oral promise to pay note bearing 8 per cent. interest per annum, made after maker's discharge in bankruptcy, unenforceable.—Farmers' & Merchants' Bank v. Richards, Mo., 95 S. W. Rep. 290.

12. BENEFIT SOCIETIES—Change of Beneficiary.—A member of a beneficial association has a right to change his beneficiary by complying with the by-laws of the association.—Knights of Maccabees of the World v. Sackett, Mont., 86 Pac. Rep. 423.

13. BENEFIT SOCIETIES—Compliance with Regulations.—It is a general rule with respect to mutual benefit insurance that the insured must, in changing the beneficiary, comply with the regulations contained in the policy and by-laws of the association.—Knights of Maccabees of the World v. Sackett, Mont., 86 Pac. Rep. 473.

14. BILLS AND NOTES—Consideration.—Where a note was signed by two joint debtors for the purpose of extending a prior debt, such extension was a good consideration as against another joint maker of the note.—*In re* Kemp's Estate, 100 N. Y. Supp. 221.

15. BILLS AND NOTES—Marshaling Assets.—The maker of a note and the acceptor of drafts are primarily liable and the transferee thereof is secondarily liable on a subsequent transfer.—Campbell v. J. I. Campbell Co., La., 41 So. Rep. 696.

16. CARRIERS—Baggage.—Independent private enterprise by corporation acting for carrier as to baggage held subordinate to the service which must be rendered to persons who tender parcels to be checked as baggage, duly accompanied by tickets or other evidence of the right of transportation.—Atlanta Terminal Co. v. American Baggage and Transfer Co., Ga., 54 S. E. Rep. 711.

17. CARRIERS—Delay in Delivering Freight.—Where a common carrier fails to deliver merchandise within a reasonable time, and there is no depreciation in the intrinsic value of such merchandise, the measure of damages is the depreciation in the market value.—Chicago, R. I. & P. Ry. Co. v. Broe, Okla., 86 Pac. Rep. 441.

18. CARRIERS—Ejection of Passenger.—A passenger held bound to ascertain whether the train she was about to board would stop at her destination, unless the carrier's conduct had been such as to induce her to believe that its rule not to stop train there has been abrogated.—Albin v. Gulf, C. & S. F. Ry. Co., Tex., 95 S. W. Rep. 589.

19. CARRIERS—Injury to Shipment of Cattle.—A carrier sued for damages to a shipment of cattle held required to plead the failure of the shipper to give the notice of his claim for damages required by the contract to make the same available as a defense.—McNealey v. Chicago, B. & Q. Ry. Co., Mo., 95 S. W. Rep. 812.

20. CARRIERS—Jostling of Porter Causing Death of Passenger.—The reckless jostling of a passenger by a porter, causing the passenger to fall through an opening in the vestibule and off the train, renders the railroad company liable for the resulting damages.—Chicago, R. I. & P. Ry. Co. v. Ferguson, Kan., 86 Pac. Rep. 471.

21. CHARITIES—Change of Conditions.—Establishment of public school system held not to meet purpose of testator, who left bequest for education of poor children, so as to require removal of restrictions as to age and territory within which fund might be applied.—Crow v. Clay County, Mo., 95 S. W. Rep. 369.

22. CHARITIES—Construction as to Particular Words.—A bequest for the education of "orphans or poor children" means orphans without estate to pay for such education, and children whose parents are living but are too poor to pay for it.—Crow v. Clay County, Mo., 95 S. W. Rep. 369.

23. CHARITIES—Cy-Pres Doctrine.—Authorization of mixed school to prevent loss of charity to beneficiaries held not such diversion of gift as to deprive court of power to make it.—Inglish v. Johnson, Tex., 95 S. W. Rep. 558.

24. CHATTEL MORTGAGES—Liens.—One held not entitled to a lien on animals, either under the statute giving a lien for keeping animals, or under the claim of a pledge, as against a mortgagee in a mortgage executed by the owner.—Cotton v. Arnold, Mo., 95 S. W. Rep. 280.

25. CHATTEL MORTGAGES—Possession by Mortgagee.—In an action by a chattel mortgagee to recover certain sheep, evidence examined, and held sufficient to show ownership of the sheep by the mortgagor at the time of execution of the mortgage, and to identify the property therein described.—Manti City Sav. Bank v. Peterson, Utah, 86 Pac. Rep. 414.

26. COMMERCE—Local or Interstate Shipment.—Shipment from point without the state to point within the state, and thence to intended destination within the state held an interstate shipment so that rate fixed by state commission cannot be claimed for the shipment between points within the state.—Porter v. St. Louis Southwestern Ry. Co. of Texas, Ark., 95 S. W. Rep. 453.

27. CONSTITUTIONAL LAW—Discrimination by Reason of Race.—Act April 4, 1905 (Acts 1905, p. 321, ch. 150), providing for the separation of white and colored passengers on street cars, held not violative of Const. art. 11, § 8, as arbitrary class legislation.—Morrison v. State, Tenn., 95 S. W. Rep. 494.

28. CONSTITUTIONAL LAW—Fellow Servant Act.—The fellow servant act (Sess. Laws 1901, p. 161) held not unconstitutional as depriving employers of labor of their property without due process of law.—Vindicator Consol. Gold Min. Co. v. Firstbrook, Colo., 86 Pac. Rep. 813.

29. CONSTITUTIONAL LAW—Judicial Determination.—Consumers of gas held entitled to continuance of the service until a judicial determination as to the constitutionality of an act prescribing the rate to be charged.—Richman v. Consolidated Gas Co., 100 N. Y. Supp. 81.

30. CONSTITUTIONAL LAW—Legislative Construction.—A legislative interpretation of a constitutional provision as evidenced by an enactment which for many years had been acquiesced in by the people affected thereby affords potent reason for sustaining the validity of the act, unless it conflicts with the constitution.—Wallace v. Board of Equalization, Oreg., 86 Pac. Rep. 365.

31. CONTRACTS—Renunciation.—Where one party to a contract renounces it before time for performance, the other party may then sue for a breach.—Seymour v. Warren, 100 N. Y. Supp. 267.

32. CORPORATIONS—Action by Stockholders.—A stockholder held entitled to sue for misconduct of directors without first requesting the corporation to sue, where such directors are in control of the corporation.—Polhemus v. Polhemus, 100 N. Y. Supp. 263.

33. CORPORATIONS—Contracts Before Incorporation.—Where an owner sold property to a company in consideration of its organizing a stock corporation, and the company did not intend to pay anything for the stock which it should receive, the owner held entitled to sue the company and the corporation.—A. J. Cranor Co. v. Miller, Ala., 41 So. Rep. 678.

34. CORPORATIONS—Contracts of Promoters Before Organization.—A corporation cannot be bound by a contract between promoters prior to its organization.—Miser Gold Min. & Mill Co. v. Moody, Colo., 86 Pac. Rep. 335.

35. CORPORATIONS—Pledge of Stock.—Where a certificate of stock was pledged with an agent to secure a debt to the principal, the principal had no right to sell the certificate except at public auction on personal notice to the pledgor of the time and place of the sale.—Treadwell v. Clark, 100 N. Y. Supp. 1.

36. CORPORATIONS—Transfer of Stock.—A transferee of corporate stock must, to relieve himself of notice or knowledge of certain facts, prove facts constituting an estoppel as against the owner claimingthe stock.—Treadwell v. Clark, 100 N. Y. Supp. 1.

37. COUNTIES—Annexation.—The cash received from money in the treasury at the time of annexation was available to pay current expenses and to compensate Nez Perce county for its outlay in maintaining county government in the annexed territory.—Shoshone County v. Schuldt, Idaho, 86 Pac. Rep. 418.

38. CRIMINAL EVIDENCE—Admissibility.—Though no evidence of the acts or declarations of a conspirator should be admitted against a co-conspirator until conspiracy has been established, yet the court in its discretion may change the order of proof.—Chapline v. State, Ark., 95 S. W. Rep. 477.

39. CRIMINAL TRIAL—Continuance.—One accused of crime held not entitled to complain of a ruling forcing him to trial on a substituted indictment within two days after the substitution.—Stevens v. State, Tex., 95 S. W. Rep. 505.

40. CRIMINAL TRIAL—Remarks of Court.—It will be presumed on appeal that the trial court, in a crminal case, in pointedly drawing the attention of the jury to a material inquiry, deemed it necessary so to do to prevent a miscarriage of justice.—People v. Smith, 100 N. Y. Supp. 259.

41. CRIMINAL TRIAL—Right to Continuance.—Where accused was represented by four attorneys, and 15 days elapsed from the arrangment to the day of trial, insufficiency of time to prepare for the trial was no ground for continuance.—State v. Pointdexter, La., 41 So. Rep. 688.

42. CRIMIINAL TRIAL—Transcript on Appeal.—Where a transcript on appeal failed to show that accused was arraigned or that a plea of not guilty was entered, there was no issue to sustain a conviction.—State v. Sharpe, Mo., 95 S. W. Rep. 298.

43. CRIMINAL TRIAL—Venue.—In a prosecution for violation of the local option law, it is necessary to show that the alleged sale occurred in the county where the prosecution was begun.—Isom v. State, Tex., 95 S. W. Rep. 518.

44. CUSTOMS AND USAGES—Evidence.—Proof of a custom among traveling salesmen alone is inadmissible as affecting the principles of such salesmen.—Gould v. Cates Chair Co., Ala., 41 So. Rep. 675.

45. DAMAGES—Punitive Damages.—Where the complaint in an action for trespass contains a prayer for punitive damages, but contains no allegations justifying such damages, the element of punitive damages must be eliminated.—Board of Directors of St. Francis Levee Dis. v. Redditt, Ark., 95 S. W. Rep. 482.

46. DEATH—Right to Sue.—Where intestate was killed by the wrongful act of a railroad company in a state whose statutes authorized an action by his administrator, such adminstrator appointed in Colorado held entitled to sue there to enforce such cause of action.—Denver & R. G. R. Co. v. Warring, Colo., 86 Pac. Rep. 305.

47. DIVORCE—Collateral Attack.—An attack on a decree of divorce held collateral, so that defects in proceedings were available to plaintiff unless they rendered the decree absolutely void.—McDermott v. Gray, Mo., 95 S. W. Rep. 481.

48. ELECTION OF REMEDIES—Inconsistent Remedies.—To make a case for the application of the doctrine of election of remedies, the party must have actually two inconsistent remedies.—Southern Ry. Co. v. City of Attalla, Ala., 41 So. Rep. 664.

49. EMBEZZLEMENT—Conversion of Funds by Attorney.—An attorney refusing after demand to pay over to his client money belonging to her held guilty of larceny, even though the money remained on deposit in the bank where it was originally deposited.—People v. Birnbaum, 100 N. Y. Supp. 160.

50. EMBEZZLEMENT—Secretary of Building Association.—The secretary of a building and loan association held subject to prosecution for embezzlement of the funds of an association which he took with intent to convert to his own use, under Rev. St. 1899, § 1912, and not under section 1874.—State v. Shour, Mo., 95 S. W. Rep. 405.

51. EMINENT DOMAIN—Condemnation Proceedings.—Condemnation proceedings are not common-law actions, and when they meet the constitutional requirements and provide for notice to the parties affected they are valid.—Board of Directors of St. Francis Levee Dist. v. Redditt, Ark., 95 S. W. Rep. 482.

52. EMINENT DOMAIN—Defenses.—In a proceeding to condemn a right of way for an irrigation ditch, plaintiff's failure to prove that she was the owner of a water right, or had appropriated water, did not require the granting of a nonsuit.—Schneider v. Schneider, Colo., 86 Pac. Rep. 347.

53. EQUITY—Findings by Jury.—Where the court submits certain questions involved in a suit in equity to the jury, if the jury fails to find on any material issues, the court should find on those issues before entering judgment.—Sandstrom v. Smith, Idaho, 86 Pac. Rep. 416.

54. EQUITY—Statute of Limitations.—The interposition of the statute of limitations as a defense to a suit in equity furnishes plaintiff with a sufficient suggestion of the necessity of offering an excuse for delay in instituting the suit.—Dexter v. MacDonald, Mo., 95 S. W. Rep. 359.

55. ESTOPPEL — Timber Culture Claim. — Where an owner of land offered for sale stands by and encourages the sale, and another person in ignorance of the true title is induced to make the purchase, the owner cannot dispute the purchaser's title.—Haun v. Martin, Oreg., 86 Pac. Rep. 871.

56. EVIDENCE—Abbreviations.—The signification of the letters "R. L. D.," when used in the records of the United States revenue collector, is so well known that courts take judicial notice thereof.—State v. Nippert, Kan., 86 Pac. Rep. 478.

57. EVIDENCE — Best and Secondary. — In an action against a telegraph company for negligent delay in delivering the message, the proper foundation held to have been laid for parol testimony as to a written instrument. —Western Union Telegraph Co. v. Salter, Tex., 95 S. W. Rep. 549.

58. EVIDENCE—Foundation.—A builder held not entitled to read the contents of a momorandum, consisting of items of extra work, in an action to recover therefor, in the absence of a proper foundation laid.—Shesler v. Patton, 100 N. Y. Supp. 286.

59. EVIDENCE—Judicial Notice.—The court takes judicial cognizance of the fact that the Atlanta and West Point Railroad Company is the successor by legislation of the Atlanta and LaGrange Railroad Company.—Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., Ga., 54 S. E. Rep. 736.

60. EVIDENCE — Parol Testimony.—In an action for broker's services, parol proof of negotiations or stipulations antedating the execution of the written option held inadmissible.—Fox v. Denargo Land Co., Colo., 86 Pac. Rep. 344.

61. EVIDENCE—Value of Fence.—In an action for the value of a fence destroyed by fire communicated by defendant's locomotive, it is proper to permit witnesses familiar with the character and value of the property to testify as to the value.—Wiggins v. St. Louis, M. & S. E. Ry. Co., Mo., 95 S. W. Rep. 311.

62. EXECUTION—Wrongful Levy.—In an action against a sheriff for selling under execution wood levied on under execution against another, proof that plaintiff has bought the wood as agent for another party held sufficient to defeat recovery.—Smiley v. Hooper, Ala., 41 So. Rep. 660.

63. EXECUTORS AND ADMINISTRATORS—Services of Physician.—An executor held entitled to be reimbursed from the estate the amount expended in litigation involving the validity of the will.—*In re* Title Guaranty & Trust Co., 100 N. Y. Supp. 243.

64. FALSE PRETENSES—Sufficiency of Information.—On information which charged that defendant obtained a draft for money as commission for a loan on false pretenses held no error was committed in denying a motion to make it more definite and certain.—State v. Briggs, Kan., 86 Pac. Rep. 447.

65. FOOD—Selling Renovated Butter. — Agricultural Law, Laws 1893, p. 663, ch. 338, § 27, as amended by subsequent acts, requiring packages containing renovated butter to be plainly marked, held not complied with by an oral statement of the seller as to the nature of the butter offered for sale.—People v. Waters, 100 N. Y. Supp. 177.

66. FORCIBLE ENTRY AND DETAINER—Instructions.—In forcible entry and detainer, request to charge that, if defendants' possession was a scrambling possession when obtained, the jury should find a verdict for plaintiff, held properly refused.—Fowler v. Pritchard, Ala., 41 So. Rep. 667.

67. FORCIBLE ENTRY AND DETAINER—Notice to Quit.—That notice to quit before an action of unlawful detainer and the complaint did not correctly describe all the tracts of land leased to defendant did not bar a recovery of the tracts correctly described.—Peddicord v. Berk, Kan., 86 Pac. Rep. 465.

68. GARNISHMENT—Bond to Dissolve. — A judgment against a garnishee is a condition precedent to a judgment on a bond given to dissolve the garnishment.—Smith v. Kennedy, Ga., 54 S. E. Rep. 731.

69. HOMICIDE—Evidence.—In a prosecution for assault with intent to murder, alleged to have resulted from defendant's attempt to collect a note, evidence that the note had not been paid was admissible.—Brundige v. State, Tex., 95 S. W. Rep. 527.

70. HOMICIDE—Evidence.—In prosecution for homicide of a wife by her husband, it is not necessary that acts of ill treatment and cruelty on the part of the husband towards the wife should all be proved by the same witness.—Green v. State, Ga., 54 S. E. Rep. 724.

71. INDICTMENT AND INFORMATION—Distinct Offenses—Where the evidence disclosed several transactions and offenses occurring at different times and places alleged in the same count of the information, defendant was entitled to compel the state to elect on which transaction it would proceed.—Thweatt v. State, Tex., 95 S. W. Rep. 517.

72. INFANTS—Next Friend.—It will not be presumed that a grandfather prosecuted a suit as next friend of an infant granddaughter, where he was not her legal guardian and did not pretend to represent her in the suit.—Lutcher v. Allen, Tex., 95 S. W. Rep. 572.

73. INJUNCTION—Sale of Good Will.—Agreement as to effect of dissolution of partnership construed, and held that retiring partner would be restrained from soliciting the customers of the firm, and all who became customers after the dissolution of the partnership.—Sanford Dairy Co. v. Sanford, 100 N. Y. Supp. 270.

74. INTEREST—Time of Computation.—A wife receiving the money on a paid up policy assigned to her by her husband held not liable for interest in the suit by a creditor of the husband, praying for the cancellation of the transfer, until demand and a refusal to pay.—Vashon v. Barrett, Va., 54 S. E. Rep. 705.

75. INTERNAL REVENUE—Intoxicating Liquors. — Entries in the office of the United States collector of internal revenue may be proved by examined copies made by a person not having the official custody of the records.—State v. Schaeffer, Kan., 86 Pac. Rep. 477.

76. INTERPLEADER—Right to File.—A bill of interpleader should allege that the debtor filing it is disinterested, the character of the different claims made, that there is a reasonable doubt as to who is entitled to the fund or duty, and that the claims constitute a single demand.—Nixon v. Malone, Tex., 95 S. W. Rep. 577.

77. INTOXICATING LIQUORS—Evidence.—In a prosecution for maintaining a liquor nuisance at a particular place, an application for gas to be used at that place, signed by the defendant, held admissible in evidence against him.—State v. Schaeffer, Kan., 86 Pac. Rep. 477.

78. INTOXICATING LIQUORS—Sale to Minor.—Where a bartender sells liquor to a minor, the owner of the saloon is guilty, though he was absent from the city at the time.—State v. Constatine, Wash., 86 Pac. Rep. 384.

79. JUDGMENT—Collateral Attack on a Default Judgment.—In a collateral attack on a default judgment, reciting that defendant, though citation by publication had been legally made on him, failed to appear, parol evidence showing the nonresidence of defendant was inadmissible.—Lutcher v. Allen, Tex., 95 S. W. Rep. 572.

80. JUDGMENT—Effect as Estoppel.—Where a second action is on a different claim or demand from that involved in the first action, the first judgment operates as an estoppel only as to those matters actually litigated.—Grand Valley Irr. Co. v. Fruita Imp. Co., Colo., 86 Pac. Rep. 824.

81. JUDGMENT—Motion in Arrest.—The jury's failure to find affirmatively either for or against a certain defendant was ground for a motion in arrest of judgment by the other defendants.—Winkelman v. Maddox, Mo., 95 S. W. Rep. 808.

82. JUDGMENT—Suit in Equity.—Where the court submits certain questions involved in a suit in equity to the jury, if the fury fails to find on any material issues, the court should find on those issues before entering judgment.—Sandstrom v. Smith, Idaho, 86 Pac. Rep. 416.

83. JURY—Determination of Issues.—Where there is a suit in equity and a cross-action at law, either party has a right to have the questions in the law action determined by the jury, and the court can submit certain questions involved in the suit in equity to the jury.—Sandstrom v. Smith, Idaho, 86 Pac. Rep. 416.

84. JUSTICES OF THE PEACE—Effect of Returned Warrant.—When a warrant has been issued by a justice of the peace, and thereafter by direction of the county attorney the sheriff returns said warrant "Not found," and files the same with the justice, it becomes *functus officio*.—*Ex parte* Broadhead, Kan., 86 Pac. Rep. 458.

85. LANDLORD AND TENANT — Defective Premises.—Plaintiff held not bound to give notice to his landlords of the leaky condition of the roof, under a clause in the lease, as a condition to a right to sue for damages sustained thereby.—Pratt, Hurst & Co. v. Tailer, 100 N. Y. Supp. 16.

86. LANDLORD AND TENANT — Defective Streets. — A municipal corporation is liable for negligence in the construction of its streets.—Barree v. City of Cape Girardeau, Mo., 95 S. W. Rep. 380.

87. LANDLORD AND TENANT — Eviction. — A tenant's waiver of claims for damages on account of trespass by adjoining tenants held not to relieve the landlord from liability for an eviction.—Isabella Gold Min. Co. v. Glenn, Colo., 86 Pac. Rep. 849.

88. LANDLORD AND TENANT — Failure to Pay Rent.—Time of payment of rent being of the essence of a lease, the tenants held not entitled to hold possession for the succeeding year after having failed to pay rent, nor to claim reimbursement for improvements made on the leased premises.—Smith v. Caldwell, Ark., 95 S. W. Rep. 467.

89. LANDLORD AND TENANT—Lease.—A lessee in a lease binding the lessor to install a dynamo and engine in the building leased for the use of the lessee held not entitled to object on the ground that the dynamo and engine installed were not of the character called for in the lease.—New Era Mfg. Co. v. O'Reilly, Mo., 95 S. W. Rep. 822.

90. LARCENY—Defective Verdict.—Where the verdict found the accused simply "guilty of larceny," and no objection was made to its form until after the jury had been discharged, refusal to arrest judgment on the ground that it did not show the value of the property stolen held not error.—State v. James County, La., 41 So. Rep. 702.

91. LIFE INSURANCE—Parol Transfer.—A parol transfer or gift of a life insurance policy, accompanied by a delivery thereof, is effective to transfer the proceeds of the policy.—Nixon v. Malone, Tex., 95 S. W. Rep. 577.

92. LIMITATION OF ACTIONS—Rights of Third Persons.—Repudiation by a grantee of land of an agreement to pay debts of the grantor held not to set the statute of limitations in motion as against the right of a creditor of the grantor to enforce the agreement.—Greenley v. Greenley, 100 N. Y. Supp. 114.

93. LOGS AND LOGGING—Use of Banks of Stream.—A riparian owner held entitled to an injunction restraining the future threatened use of the banks of a stream on his premises by defendant sawmill company for the floatage of shingle bolts down the stream.—Mitchell v. Lea Lumber Co., Wash., 86 Pac. Rep. 405.

94. MANDAMUS—Apportionment of Assembly Districts.—*Mandamus* lies to compel the reconvening of the board of supervisors of a county for the purpose of making a constitutional apportionment of the county into assembly districts.—*In re* Timmerman, 100 N. Y. Supp. 57.

95. MANDAMUS—Gas Companies.—The duty of a gas company to furnish consumers with gas at the rate prescribed by the legislature may be enforced by *mandamus*.—Richman v. Consolidated Gas Co., 100 N. Y. Supp. 81.

96. MARSHALLING ASSETS AND SECURITIES — Creditor Holding Securities.—A creditor holding collateral security may be required to exhaust such security before being allowed to participate in the distribution of a common fund which is insufficient to pay in full the debts of the common debtor.—Campbell v. J. I. Campbell Co., La., 41 So. Rep. 696.

97. MASTER AND SERVANT—Assumed Risk.—A railroad employee held to assume only the "ordinary" risks of his employment and not those arising from his employer's negligence in failing to inspect its track or maintain it in proper condition.—Denver & R. G. R. Co. v. Warring, Colo., 86 Pac. Rep. 805.

98. MASTER AND SERVANT—Dangerous Conditions.—A servant working in proximity to trolley wires not required in the prosecution of the master's business to be kept charged with electricity is not required to assume that they are so charged.—Cessna v. Metropolitan St. Ry. Co., Mo., 95 S. W. Rep. 277.

99. MASTER AND SERVANT—Safe Place to Work —A higher degree of care to furnish a safe place in which to work held required of an employer whose employees are underground with scant means of escape than where the employees are in a position to escape readily from dangers.—Williams v. Sleepy Hollow Min. Co., Colo., 86 Pac. Rep. 887.

100. MASTER AND SERVANT—Unexpected Danger. — A servant held not bound to anticipate that a safe place will be suddenly changed into an unsafe one by a master's selection of a defective and dangerous method of operation without warning.—Ball v. Megrath, Wash., 86 Pac. Rep. 882.

101. MASTER AND SERVANT—Wages During Enforced Idleness.—Employer held liable for wages of employee during period in which he did no work on account of fire.—Magida v. Wiesen, 100 N. Y. Supp. 268.

102. MECHANICS' LIENS—Incumbrances.—That a deed of trust was superior to mechanics' liens on the interest of certain tenants in common in the land held not to deprive the lien claimants of the right to have the land and buildings sold subject to incumbrances to pay their claims.—Seely v. Neill, Colo., 86 Pac. Rep. 834.

103. MORTGAGES—Limitations.—Where a mortgagee takes possession under an agreement to apply the rents on the debt, limitations will not run against the mortgagor's right to redeem until the mortgagee, with notice to the mortgagor, asserts title.—Hunter v. Coffman, Kan., 86 Pac. Rep. 451.

104. MUNICIPAL CORPORATIONS — Ordinance Against Operating Pool Tables.—A prohibitive ordinance enacted pursuant to legislative authority is not invalid because it suppresses pool tables lawfully maintained at the time the ordinance goes into effect.—City of Burlingame v. Thompson, Kan., 86 Pac. Rep. 449.

105. MUNICIPAL CORPORATIONS—Prohibiting Maintenance of Pool Tables for Hire.—The legislature may authorize cities of the third class to prohibit the maintenance of pool tables for hire within the city.—City of Burlingame v. Thompson, Kan., 86 Pac. Rep. 449.

106. MUNICIPAL CORPORATIONS—Taxpayers Enjoining Illegal Contracts.—A taxpayer in a city can properly maintain a bill to restrain public officials of the city from paying out public moneys upon void and unauthorized contract.—Anderson v. Fuller, Fla., 41 So. Rep. 684.

107. NEGLIGENCE—Showing Repairs Made After Accident.—In action for the death of a servant alleged to have been caused by defective appliances, admission of testimony that the appliance was repaired after the accident held prejudicial error.—St. Louis Southwestern Ry. Co. v. Plumlee, Ark., 95 S. W. Rep. 442.

108. NOTARIES—False Certificate.—In an action against a notary for falsely certifying to the execution of an assignment of a homestead right, evidence held insufficient to show that the person purporting to make the assignment had such a right.—Coffin v. Bruten, Ark., 95 S. W. Rep. 462.

109. PARTNERSHIP—Dissolution.—Rescission of fraudulent contract of dissolution, and the return of the property received thereunder, held not a condition precedent to an action for further accounting, brought by the injured party.—Oliver v. House, Ga., 54 S. E. Rep. 782.

110 PARTNERSHIP—What Constitutes.—Where officers and members of a foreign mercantile corporation, with capacity to do business only in certain named counties of a foreign state, attempt to establish the corporation under another name in Louisiana, the effect as to third parties is the establishment of a partnership.—Campbell v. J. I. Campbell Co , La., 41 So. Rep. 696.

111. PERJURY—Setting Forth Testimony.—On a prosecution for perjury, it was proper to set forth in the same count in the information all of the false statements with which defendant was charged, where they all related to the same transaction.—State v. Gordon, Mo., 95 S. W. Rep. 420.

112. PHYSICIANS AND SURGEONS—Employment.—Railroad surgeon held not entitled to recover for services rendered an injured passenger after the surgeon could have obtained instructions from the railroad's general claim agent on a report which it was his duty to promptly submit.—Hays v. Wabash R. Co., Mo., 95 S. W. Rep. 299.

113. PLEADING—Admissions.—Where a party makes solemn admissions against his interest in a pleading they must be treated as admitting facts and he cannot question the correctness thereof while they remain a part of the record.—Rogers v. Brown, Okla., 86 Pac. Rep. 443.

114. PLEADING — Demurrer. — Mere reasons assigned why a general demurrer should be sustained to certain interpleading answers are not special exceptions to such answers.—Nixon v. Malone, Tex., 95 S. W. Rep. 577.

115. PLEDGES—Recovery.—A pledgor of corporate stock seeking to recover the same while in the hands of a transferee from the pledgee, held entitled to recover the stock or its value at the time of trial.—Treadwell v. Clark, 100 N. Y. Supp. 1.

116. PRINCIPAL AND AGENT — Authority of Agent. — Whether a traveling salesman with authority to take orders subject to approval told a buyer, when he took an order, that he would have to send it to the manufacturer for acceptance, was incompetent as against the manufacturer.—Gould v. Cates Chair Co., Ala., 41 So. Rep. 675.

117. PRINCIPAL AND AGENT — Compensation of Sub-Agent.—Where an agent employs a servant to assist him, the servant must look to his immediate employer, the agent, for compensation.—Houston County Oil Mills & Mfg. Co. v. Bibby, Tex., 95 S. W. Rep. 562.

118. PUBLIC LANDS — Land Granted to Railroad. — Where railroad company accepted congressional grant

of land, it was beyond the power of congress thereafter to derogate from the rights of the railroad company in such lands in the absence of any forfeiture of its rights by any act or omission of the railroad company.—Walbridge v. Board of Com'rs of Russell County, Kan., 86 Pac. Rep. 473.

119. PUBLIC LANDS—Time of Vesting of Title.—Grant to railway company held to become effective on the filing of the map of definite location with the secretary of the interior, and to relate back and vest in the railway company an interest in the land as of the date of the grant in 1862.—Walbridge v. Board of Com'rs of Russell County, Kan., 86 Pac. Rep. 473.

120. RAILROADS—Accident at Crossing.—The presumption that a person who was killed at a crossing exercised due care held by the undisputed evidence that if he had looked and listened he must have seen and heard the approaching train.—Bressler v. Chicago, R. I. & P. Ry. Co., Kan., 86 Pac. Rep. 472.

121. RAPE—Evidence.—On a prosecution for assault with intent to rape, it was proper for the state to show the condition of prosecutrix on the night of the day on which the crime was committed.—Turman v. State, Tex., 95 S. W. Rep. 533.

122. REMOVAL OF CAUSES—Federal Court.—A party resisting the removal of a cause to the federal court, notwithstanding the refusal of the state court to grant a removal, held required on recognizing the jurisdiction of the federal court to commence a new suit in the state court in order to prosecute his action in that court.—Texas & P. Ry. Co. v. Huber, Tex., 95 S. W. Rep. 568.

123. SALES—Nature of Contract.—A contract by defendant to sell all furniture manufactured by it during a certain time to plaintiff as its sole agent in certain territory held to constitute a sale, and not an agency.—Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co., Oreg., 86 Pac. Rep. 357.

124. SALES—Powers of Agent.—The act of a manufacturer employing a salesman with authority to take orders subject to approval held not to constitute an acceptance of an order made by the salesman.—Gould v. Cates Chair Co., Ala., 41 So. Rep. 675.

125. SALES—What Constitutes.—A contract by defendant to sell all furniture manufactured by it during a certain time to plaintiff as its sole agent in certain territory held to constitute a sale, and not an agency.—Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co., Oreg., 86 Pac. Rep. 357.

126. SCHOOLS AND SCHOOL DISTRICTS—Laches of Teacher in Asking Reinstatement.—Delay of teacher in applying for reinstatement held to justify denial of application for *mandamus* against board.—Grendon v. Board of Education of City of New York, 100 N. Y. Supp. 253.

127. SCHOOLS AND SCHOOL DISTRICTS—Powers of Directors.—The acts of a board of school directors in excess of their authority in the issuance of bonds as to recitals contained in the bonds do not estop the district or bind their successors in office.—Schmutz v. Special School Dist. of City of Little Rock, Ark., 95 S. W. Rep. 488.

128. SPECIFIC PERFORMANCE—Knowledge of Contract.—In the absence of fraud or deception it is incumbent on a lessor, on signing a contract of lease, to read it carefully or have it read, and to stop and listen, and take no chances touching the contents of the act.—Murphy v. Hussey, La., 41 So. Rep. 692.

129. STIPULATIONS—Requisites.—An oral stipulation by defendant's attorney that if a settlement could not be effected, a state agent on whom service might be had would be appointed, held unenforceable under district court rule 27 (24 Pac. Rep. xi).—Stretch v. Montezuma Min. Co., Nev., 86 Pac. Rep. 445.

130. TAXATION—Validity.—Taxes levied on land for a sum including interest on a debt of a municipality incurred before the land was included within the municipality are void at least to the extent that they include interest on such debt.—Holcomb v. Johnson's Estate, Wash., 86 Pac. Rep. 409.

131. TRIAL—Directing Verdict.—An issue of negligence should not be withdrawn from the jury unless there is no material conflict in the evidence, and different inferences cannot be drawn from it.—Texarkana & Ft. S. Ry. Co. v. Frugia, Tex., 95 S. W. Rep. 563.

132. TRIAL—Expert Testimony.—A witness held competent to state that the clothes of the accused smelled of carbolic acid, and that it was the same odor as that from a bottle found near deceased; the ground of objection being that the witness was not an expert.—Green v. State, Ga., 54 S. E. Rep. 724.

133. TRIAL—Introduction of Evidence.—After the evidence had been introduced and argument commenced, it was within the discretion of the trial court whether or not he would allow plaintiff to introduce additional material evidence.—Watson v. Barnes, Ga., 54 S. E. Rep. 723.

134. TROVER AND CONVERSION—Right of Plaintiff to Possession.—To support an action of trover the right to property, general or special, and possession or an immediate right of possession, must concur in the plaintiff at the time of the conversion.—Southern Ry. Co. v. City of Attalla, Ala., 41 So. Rep. 664.

135. TRUSTS—Accounting.—A deed by a trustee having recited a consideration of $12,500, the trustee held liable to account for such amount in the absence of evidence that it was not received.—Smith v. Perry, Mo., 95 S. W. Rep. 387.

136. TRUSTS - Duty to File Itemized Account.—A testamentary trustee held not bound to file an itemized account of receipts and disbursements, nor vouchers therefor, in the operation of a business without authority, which was started by the testator.—*In re* Byrnes, 100 N. Y. Supp. 12.

137. VENDOR AND PURCHASER—Option to Purchase.—A lessee accepting an option in the lease for the purchase of the property need not tender any other amount that he owes the lessor than that named in the option.—Murphy v. Hussey, La., 41 So. Rep. 692.

138. VENDOR AND PURCHASER—Option to Purchase.—Where a lessor refused to recognize the binding effect of an option in the lease for the sale of the property, it was not necessary for the lessee, in order to complete his tender, to deposit it—Murphy v. Hussey, La., 41 So. Rep. 692.

139. WATERS AND WATER COURSES—Determination of Rights.—The *pro rata* interests of the owners of a mutual ditch using the water severally, and the right to change a point of diversion, may be determined in one proceeding.—Hallett v. Carpenter, Colo., 86 Pac. Rep. 817.

140. WATERS AND WATER COURSES—Obstruction by Railway Embankment.—Where a railroad obstructed the flood waters of a stream by its embankment in violation of statute, it was liable for the resulting damage, regardless of the question of negligence.—Missouri, K. & T. Ry. Co. of Texas v. Dubose, Tex., 95 S. W. Rep 588.

141. WATERS AND WATER COURSES—Riparian Proprietors.—A riparian proprietor held entitled to have a stream flow through his premises undiminished in quantity and quality, except as to the reasonable use of other like proprietors.—Brown v. Gold Coin Min. Co., Oreg., 86 Pac. Rep. 361.

142. WITNESSES—Impeachment.—A litigant cannot impeach a witness whom he himself first uses, though the witness is afterwards called to testify for the adverse party.—Johnston v. Marriage, Kan., 86 Pac. Rep. 461.

143. WITNESSES—Transactions With Agent Since Deceased.—Where defendants contracted to pay royalties, with testator's deceased agent, defendants held entitled to testify concerning personal transactions and communications with the agent, notwithstanding Code Civ. Proc. § 829.—Warth v. Kastriner, 100 N. Y. Supp. 279.

144. WORK AND LABOR—Architect's Services.—Architects who failed to perform a contract for the drawing of plans for a building held nevertheless entitled to recover the reasonable expense of drawing the plans.—Horgan & Slattery v. City of New York, 100 N. Y. Supp. 68.